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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK GREENBERG, INDEPENDENT EXECUTOR
OF THE ESTATE OF
JOHN W. "JACK" McGANN,
Petitioner,

v.

H & H MUSIC COMPANY, BROOK
MAYS MUSIC COMPANY, and GENERAL
AMERICAN LIFE INSURANCE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT GENERAL AMERICAN LIFE INSURANCE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employee has a right protected by § 510 of ERISA to continuous, uninterrupted group health insurance?
2. To prove discrimination under § 510, whether an employee need prove more than the employer's discriminatory intent to interfere with the employee's rights?
3. Whether the public would be better served by protecting employers' rights to control non-vested benefits or permitting the courts to determine which benefits must be offered?
4. Whether the termination and/or modification of group insurance benefits performed in accordance with the summary plan description can be discriminatory in violation of § 510 of ERISA?
5. Whether a nonemployer may be sued under § 510 of ERISA?
6. Whether a conspiracy to discriminate states a cause of action under ERISA?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS FOR REVIEW	i
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
COUNTER-STATEMENT OF THE CASE	2
A. Nature of Case	2
B. Statement of Facts	4
REASONS FOR DENYING THE WRIT	5
I. THE FIFTH CIRCUIT'S APPLICATION OF § 510 IS CORRECT AND IN ACCORD WITH OTHER CIRCUITS	5
II. THE FIFTH CIRCUIT HAS NOT CREATED A NEW STANDARD OF PROOF	10
III. BECAUSE EMPLOYERS MUST HAVE FLEXIBILITY WITH RESPECT TO EMPLOYEE BENEFITS PUBLIC POLICY DICTATES THAT THE PETITION FOR CERTIORARI SHOULD BE DENIED	11
IV. BECAUSE AN EMPLOYER HAS AN ABSOLUTE RIGHT TO ALTER THE THE TERMS OF AN EMPLOYEE BENEFIT PLAN, BARRING CONTRACTUAL PROVISIONS TO THE CONTRARY, McGANN'S § 510 CLAIM IS MOOT	13
V. A NONEMPLOYER CANNOT BE HELD LIABLE FOR A § 510 VIOLATION	15
VI. A CONSPIRACY TO DISCRIMINATE IS NOT ACTIONABLE UNDER ERISA	19
CONCLUSION	20
APPENDIX	A1-G4

TABLE OF AUTHORITIES

CASES

	Page
Aaronson v. Servus Rubber Div. of Chromalloy, 730 F.2d 12 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984)	11
Adams v. Koppers Co., 684 F. Supp. 309 (W.D. Pa. 1988)	18
Alday v. Container Corp. of America, 906 F.2d 660 (11th Cir. 1990)	13
Anderson v. Alpha Portland Industries, Inc., 647 F. Supp. 1109 (E.D. Mo. 1986), *aff'd*, 836 F.2d 1512 (8th Cir. 1988)	9
Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987)	13
Clark v. Resistoflex Co., 854 F.2d 762 (5th Cir. 1988)	10
Conkwright v. Westinghouse Elec. Co., 933 F.2d 231 (4th Cir. 1991)	6
Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989)	8
Deeming v. American Standard, Inc., 905 F.2d 1124 (7th Cir. 1990)	17
Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988)	6, 10
Fitzgerald v. Codex Corp., 882 F.2d 586 (1st Cir. 1989)	7
Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984)	7
Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987)	5, 10
Hamilton v. Travelers Ins. Co., 752 F.2d 1350 (8th Cir. 1985)	13, 14
Ingersoll-Rand Co. v. McClendon, ____U.S.____, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990)	6
Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 881 (9th Cir. 1989), *cert. denied*, ____U.S. ____, 111 S. Ct. 53, 112 L.Ed.2d 28 (1990)	10

CASES — Page

Kross v. Weston Electric Co., 701 F.2d 1238 (7th Cir. 1983) 7
McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991) ..... *passim*
Moore v. Metropolitan Life Ins. Co., 856 F.2d 448 (2d Cir. 1988) 7, 9, 12, 13
Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, ____U.S.____ (1989) 9, 13, 14
Owens v. Storehouse, 773 F. Supp. 416 (N.D. Ga. 1991) 14
Phillips v. Amoco Oil Co., 614 F. Supp. 694 (N.D. Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) 8, 19
Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324 (4th Cir. 1989) 15
Rollo v. Maxicare of Louisiana, Inc., 698 F. Supp. 111 (E.D. La. 1988) 15, 17
Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) 8
Swanson v. U.A. Local Pension Plan, ____ F. Supp. ____ (W.D. N.Y. 1991) 18
Tackitt v. Prudential Ins. Co., 758 F.2d 1572 (11th Cir. 1985) 13
Viggiano v. Shenango Division of Anchor Hocking, 750 F.2d 276 (3d Cir. 1984) 14
West v. Butler, 621 F.2d 240 (6th Cir. 1980) 17
Zipf v. American Tel. & Tel. Co., 799 F.2d 889 (3d Cir. 1986) 7

Page

RULES AND STATUTES

Fed. R. Civ. P. 56 20
Employment Retirement Security Act, 29 U.S.C. §§ 1001 *et seq.*: 2
29 U.S.C. § 1002(9) 16
29 U.S.C. § 1022(a)(1) 4
29 U.S.C. § 1140 15
29 U.S.C. § 1053 8
Tex. Ins. Code Ann., art. 21.21 (Vernon Supp. 1990) 2
Tex. Bus. & Com. Code Ann. § 17.41 *et seq.* (Tex. UCC) (Vernon Supp. 1990) 2

LEGISLATIVE MATERIAL

119 Cong. Rec. 30374 (1973) 16
119 Cong. Rec. 30044 (1973) 16

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent submits this brief to demonstrate that the petition for writ of certiorari should be denied.

OPINIONS BELOW

On June 28, 1990, the United States District Court for the Southern District of Texas (Black, J.) entered summary judgment for the Respondents. The decision of the

district court is reported at 742 F. Supp. 392. On November 4, 1991, the United States Court of Appeals for the Fifth Circuit affirmed. The opinion of the Court of Appeals is published at 946 F.2d 401. The opinions have been printed in the appendix to the petition (Pet. App. 1A-43A). We have, therefore, not reprinted the opinions.

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case:

Based upon the provisions of ERISA, 29 U.S.C. § 1001 *et seq.* and causes of action arising out of the laws of the state of Texas, Article 21.21 of the Texas Insurance Code and § 17.41 *et seq.* of the Texas Business & Commerce Code, Plaintiff/Petitioner, John McGann ("McGann") filed suit against Defendant/Respondent, General American Life Insurance Company ("General American") and Defendants/Respondents H & H Music Company ("H & H") and Brook Mays Music Company ("Brook Mays"). In addition to damages, McGann requested injunctive relief to have insurance benefits under a terminated medical insurance benefit plan restored. McGann claimed General American, H & H and Brook Mays Music Company conspired to discriminate against him and undertook deceptive practices in preventing him from exercising rights to which he alleged he was entitled under the provisions of an employee benefit plan. (Br. Opp. App. A).

General American filed a Motion for Summary Judgment (Br. Opp. App. B) and a supplement to that motion (Br. Opp. App. C) in which General American argued that McGann's allegations of discrimination under § 510 of ERISA were not actionable against General American because it was not McGann's employer. Alternatively, General Americain argued that McGann could not state

a cause of action under § 510 of ERISA. Finally, General American argued that the state court causes of action against it were preempted.[1]

The Trial Court, the Honorable Norman Black, granted General American's Motion for Summary Judgment finding "Defendants have the right to terminate the plan and complied with the requirements of ERISA." The Trial Court further stated that McGann's claims of discrimination were unfounded because McGann could not demonstrate the elements of discrimination: (1) prohibited employer conduct, (2) taken for the purpose of interfering with, (3) the attainment of any right to which the employee (McGann) may become entitled (Pet. App. 34A-43A). Summary Judgment was entered on June 28, 1990, for all Defendants/Respondents and the appeal ensued based solely upon an alleged violation of McGann's rights under ERISA. General American responded to the appeal arguing that the District Court was correct and that a nonemployer could not be sued under § 510 of ERISA.

On November 4, 1991, the Fifth Circuit affirmed the judgment of the Trial Court. Because it found that the respondents had not violated § 510 of ERISA, the Fifth Circuit determined it was not necessary to discuss the issue of whether a nonemployer could be held liable under § 510 of ERISA. *McGann v. H & H Music Co.*, 946 F.2d 401, 403 n.3 (5th Cir. 1991).

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1. Although General American's Motion for Summary Judgment included an argument that McGann's state court causes of action had been preempted under ERISA, McGann failed to raise this issue on appeal. Because McGann failed to preserve error regarding preemption, these causes of action have been abandoned and the trial court's judgment disposes of McGann's state court causes of action.

B. Statement of Facts

General American is an insurance company which provides group life and medical insurance plans. Prior to July 31, 1988, General American provided medical insurance to the employees of H & H Music Company pursuant to an agreement with Brook Mays (Br. Opp. App. D). H & H Music Company, according to the terms of ERISA, 29 U.S.C. § 1022(a)(1), provided its employees a Summary Plan Description ("SPD"). The SPD under the insurance plan in effect prior to July 31, 1988, stated that the plan's sponsor could terminate or amend the plan or terminate any benefit under the plan at any time (Br. Opp. App. D). The beneficiaries of the plan were put on notice that at any time their medical insurance could be changed or withdrawn.

John McGann, an H & H employee, was diagnosed as having Acquired Immune Deficiency Syndrome (AIDS) in December 1987 (Br. Opp. App. A). His condition was made known to Respondents.

Subsequently, on July 28, 1988, Brook Mays announced that it was exercising its right to terminate the health insurance plan covering H & H employees (Br. Opp. App. E). Brook Mays stated that the plan would end on August 1, 1988, and a new group medical care plan would take effect. The plan that was terminated was a fully insured group medical plan provided by General American (Br. Opp. App. D). The employee benefit plan which started on August 1, 1988, was a self-insured plan (Br. Opp. App. F). To effectuate this self-insured plan, General American and Brook Mays entered into an administrative services agreement (Br. Opp. App. G). Pursuant to the terms of the agreement, General American received administrative services fees to administer and take

claims under the new plan (Br. Opp. App. G). Because Brook Mays' new plan was self-insured, no policy regarding medical benefits was issued to Brook Mays by General American (Br. Opp. App. B p. B11). The new SPD under the new self-insured plan provided all H & H employees medical benefits. However, there were several differences in medical benefits between the new and old plans including deductible and "stop loss" increases, employee contribution increases, exclusion of treatment for substance abuse, and the addition of a Preferred Provider Organization Network (Br. Opp. App. D & F). Among the differences, the self-insured plan provided benefits payable for AIDS related claims with the maximum life time covered expense of $5,000.

REASONS FOR DENYING THE WRIT

COUNTERPOINT I

THE FIFTH CIRCUIT'S APPLICATION OF § 510 IS CORRECT AND IN ACCORD WITH OTHER CIRCUITS.

The equation which must be met to demonstrate discrimination under § 510 of ERISA has three elements. Each element must exist to prove discrimination. To show discrimination under § 510, an employee must prove (1) prohibited employer conduct (2) taken for the purpose of interfering with (3) the attainment of any right to which the meployee may become entitled. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987). The Fifth Circuit devoted considerable attention to McGann's failure to prove the final element of this equation. Arguably, it was unnecessary to analyze the other two given McGann's

failure to demonstrate that he had a right to which he may become entitled.

McGann erroneously claims that the Fifth Circuit's opinion regarding his failure to adduce any evidence of the existence of any right to which he may become entitled conflicts with other circuits. To support this claim, McGann incorrectly interprets the Fifth Circuit's opinion to state that an employee only has a claim under § 510 when the employee complains of an interference with a right to a *permanent* benefit. McGann contends this is wrong because other circuits have permitted § 510 claims against employers who interfered with employees' rights to non-permanent benefits. The critical and blatantly omitted element which invalidates McGann's argument is that the employees who have been successful in asserting § 510 claims for the interference with non-permanent benefits have had their employment terminated to prevent them from exercising rights to the non-permanent benefits. McGann was not terminated. The insurance plan, which offered non-permanent/non-vested benefits, was terminated in accordance with the summary plan description.

The cases cited by McGann as being in conflict with the Fifth Circuit have a fact pattern which was not before the Fifth Circuit in the present case. In all of these cases the employee was terminated.[2] In the cases involving

2. Of note, some of the cases relied upon by McGann involve situations where the employee was terminated to prevent the employee from receiving permanent/vested benefits. *Ingersoll-Rand Co. v. McClendon*, __U.S.__, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990); *Conkwright v. Westinghouse Elec. Co.*, 933 F.2d 231 (4th Cir. 1991); *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988). These cases have no similarity to the case at bar. McGann was not terminated and the dispute does not involve vested benefits. The legal arguments are also dissimilar to this case. For instance, the explicit holding of *Ingersoll-Rand* stands for the proposition that ERISA pre-empts a Texas common law cause of action for wrongful discharge taken for the purpose of avoiding pension fund payments.

nonvested benefits, the employee was fired to prevent the employee or his dependent from exercising a right under an *existing* benefit plan. *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989); *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983); *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 893 (3d Cir. 1986); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984).

In *Fitzgerald, Kross, Zipf* and *Folz,* the Plaintiffs were all terminated to prevent them or their dependents from obtaining medical benefits under an existing welfare benefit plan. *Fitzgerald v. Codex Corp.*, 882 F.2d at 587; *Kross v. Western Electric Co.*, 701 F.2d at 1239; *Zipf v. American Tel. & Tel. Co.*, 889 F.2d at 890; *Folz v. Marriott Corp.*, 594 F.2d at 1010. None of these cases involved an employee suing to enforce or reinstate a terminated benefit plan or involved an employee claiming that termination of a benefit plan is discriminatory. Instead, the Plaintiffs were prevented from obtaining a right under an existing plan by their own termination. Section 510 of ERISA proscribes an employer's termination of an employee to avoid insurance claims. However, ERISA permits the termination of an employee welfare benefit plan to avoid claims. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

A second fallacious argument in McGann's first point of error states that "the Fifth Circuit's narrow construction of section 510 removes from employees any ability to rely on a benefit plan provided by an employer" (Pet. 11). This argument is invalid because employees have no right to rely on a nonpermanent benefit, particularly when the summary plan description explicitly states that the benefit may be changed or withdrawn. Also, ERISA does not provide a remedy for reliance upon insurance benefits.

Detrimental reliance on benefits is not actionable under ERISA. *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989). Contrary to McGann's contention, employees do not have the ability or right to rely on the permanence of a nonvested benefit plan. McGann therefore cannot create a right to $1 million worth of health insurance because he anticipated or relied upon its permanent existence.

The Fifth Circuit correctly held that employees do not have a permanent right to health insurance. The Fifth Circuit's opinion is consistent with the recognized distinction between an employees' rights with respect to vested and nonvested benefits.

When enacting ERISA, Congress distinguished between two types of benefits: normal retirement benefits (hereinafter "pension or vested benefits") and ancillary benefits (hereinafter "welfare or non-vested benefits"). *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694 (N.D. Ala. 1985) *affirmed*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). Under ERISA, new rights were bestowed upon employees covered by employers' pension plans. Most notably, ERISA provided that employees had vested, nonforfeitable rights to a certain percentage of their pension benefits based upon the number of years they were employed. 29 U.S.C. § 1053.

In contrast to vested pension benefits, welfare benefits are nonvested benefits, provided under medical and health plans, early retiremnet plans, or other benefits not considered part of the normal retirement benefit to which ERISA's nonforfeitable requirements apply. *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

There was a reason for the exemption of welfare benefits from the protection of vesting. The vesting provisions would not deter employers from forming pension plans because those costs were easy to estimate; however, applying vesting provisions to the unpredictable expenses of welfare benefits, such as medical and health care insurance, would discourage employers from offering these benefits in the first place. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d at 492.

Unlike pension benefits, welfare benefits were not afforded any special protection under ERISA outside of the benefit contract between the employer and the employee. *Anderson v. Alpha Portland Industries Inc.*, 647 F. Supp. 1109, 1125 (E.D. Mo. 1986), *affirmed*, 836 F.2d 1512 (8th Cir. 1988). Employees cannot use the courts to create a protected interest in welfare benefits. such as health insurance. The plaintiffs/employees in *Musto v. American General Corp.* filed suit contending, in essence, that they had vested contractual rights in the medical benefits which prevented any change to their medical insurance contract. 861 F.2d 897, 900 (6th Cir. 1988), *cert. denied*, ____U.S.____ (1989). The Sixth Circuit failed to recognize this right, just as the Fifth Circuit has appropriately failed to recognize a vested or permanent right to medical benefits in McGann's case. The creation of vested or permanent rights to health insurance would require federal legislation. *Musto*, 861 F.2d at 911.

When the Fifth Circuit held that McGann had no permanent right or vested interest in a terminated health insurance plan, it was not in conflict with the other circuits. It followed them. Accordingly, certiorari should not be granted because there is no conflict with other circuits.

COUNTERPOINT II

THE FIFTH CIRCUIT HAS NOT CREATED A NEW STANDARD OF PROOF.

Contrary to McGann's claim, the Fifth Circuit did not create a new burden of proof for a plaintiff bringing a § 510 claim. In the decision the Fifth Circuit set forth the established burden of proof for a § 510 claim: (1) discriminatory intent (2) to interfere with the employee's rights.[3] After setting out the burden of proof, the Fifth Circuit described how McGann had failed to meet this burden by not putting forward any evidence that H & H and Brook Mays' intent to save money was discriminatory toward him. For instance, the Fifth Circuit stated that McGann had failed to show he was the only person affected by the changes in the insurance coverage and that cost-savings in this situation evidenced ill-intent toward *him. McGann,* 946 F.2d at 404-405. Without admitting that cost-savings by the employer is equivalent to true discriminatory intent, even if it were, it cannot create liability under § 510, absent proof that the intent was directed toward McGann, in particular, to interfere with a right to which he may become entitled. The courts

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3. "At trial McGann would bear the burden of proving the existence of defendants' specific discriminatory intent as an essential element of either of his claims. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989) (employee must prove employer's specific intent to retaliate for employee's exercise of rights under plan) *cert. denied*, __U.S.__, 111 S. Ct. 53, 112 L.Ed.2d 28 (1990); *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988) (employee must prove specific intent to interfere with employee's pension rights); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (section 510 claimant must prove specific intent to engage in activity prohibited by section 510); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987) (claimant must prove specific intent to violate ERISA), *cert. denied*, 484 U.S. 979, 108 S. Ct. 495, 98 L.Ed.2d 492 (1987)." *McGann*, 946 F.2d at 404.

recognize that modifications in group benefits will interfere with everyone's attainment of benefits, and are indeed expressly intended to interfere with the attainment of benefits. *Aaronson v. Servus Rubber Div. of Chromalloy*, 730 F.2d 12 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984). Here, McGann failed to show that the termination of benefits to save money proved to be discriminatory as to him and interfered with his rights.

The Fifth Circuit did not create a new burden of proof for plaintiffs in § 510 cases. Because its opinion is in accord with other circuits regarding the standard of proof for a plaintiff bringing a § 510 action, the petition for certiorari should be denied.

COUNTERPOINT III

BECAUSE EMPLOYERS MUST HAVE FLEXIBILITY WITH RESPECT TO EMPLOYEE BENEFITS, PUBLIC POLICY DICTATES THAT THE PETITION FOR CERTIORARI SHOULD BE DENIED.

What McGann is suggesting under the guise of a public policy argument is that the federal courts should freeze health care insurance for AIDS so that health insurance for this disease can never be reduced or terminated. Such a suggestion violates the very essence of ERISA and would be a tremendous disincentive to employers to offer any health care insurance when the insurance can never be changed.

Because of unpredictable economic factors, such as inflation and the variable costs associated with health care, the Fifth Circuit recognized that employer control over

health insurance benefits must exist without restraint. *McGann,* 946 F.2d at 407.

The judicial reluctance to interfere with benefit plan modification or proscribe plan termination is founded squarely upon the congressional intent which created ERISA. Congress intended for the terms of welfare benefits to be left up to the employer. *McGann,* 946 F.2d at 407. Creating, modifying, and terminating employee benefit plans were concepts addressed by Congress when it enacted ERISA. Congress particularly recognized that employers offering medical insurance must have the ability to terminate or modify their plans so that the benefit plan could survive unpredictable economic forces. *Moore v. Metropolitan Life Ins. Co.,* 856 F.2d 488, 492 (2d Cir. 1988). If employers had no flexibility to maintain the solvency of the plan, "substantial disincentives for even offering such plans would be created." *Id.*

Modification of employee benefits may present a hardship to some members of the plan, but the overall benefit is realized by the majority when the plan remains solvent. This was the outcome intended by Congress and recognized by the Second Circuit in *Moore* and the Fifth Circuit in the case at bar. *McGann,* 946 F.2d 401, 407-08.

McGann's public policy argument, if effectuated, will have a devastating effect on group health insurance. The Fifth Circuit appropriately recognized the unfortunate outcome freezing AIDS benefits may have. If the federal courts can freeze health insurance benefits or determine which health insurance benefits must be offered, employers may choose not to offer any health benefits in the first place. The petition for certiorari should, therefore, be denied.

COUNTERPOINT IV

BECAUSE AN EMPLOYER HAS AN ABSOLUTE RIGHT TO ALTER THE TERMS OF AN EMPLOYEE BENEFIT PLAN, BARRING CONTRACTUAL PROVISIONS TO THE CONTRARY, McGANN'S § 510 CLAIM IS MOOT.

Because H & H had an absolute right to modify or terminate the plan, the District Court held that McGann's § 510 claim need not be addressed. The Fifth Circuit, however, took an opposite approach and chose to address the § 510 claim and not the issue concerning the employer's absolute right to terminate the plan.[4] Although the Fifth Circuit did not address this issue, the District Court was correct. Termination of the plan was lawfully exercised. Therefore, the § 510 claim is moot and need not be reviewed by this Court.

The District Court's rationale is in accord with the established principle that employers have the right to amend or terminate welfare benefit plans so long as such right does not violate the terms and conditions of the benefit plan.[5] The only standard governing the termination or modification of the plan is whether the termination and modification was done in accordance with the plan.

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4. "As noted, the district court stated as one ground for its decision that an employer has an absolute right to alter the terms of an employee benefits plan, barring contractual provisions to the contrary [citations omitted]. We do not find it necessary to decide this question." *McGann*, 946 F.2d at 406 n.8.

5. *Alday v. Container Corporation of America*, 906 F.2d 660, 663 (11th Cir. 1990); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Musto v. American General* Corp., 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, __U.S.__ (1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987); *Hamilton v. Travelers Ins. Co.*, 752 F.2d 1350, 1351-52 (8th Cir. 1985); and *Tackitt v. Prudential Ins. Co. of America*, 758 F.2d 1572, 1575 (11th Cir. 1985).

Absent a departure from the terms of the plan, ERISA will not create liability on the part of the employer who changes the kind of health plan it provides to employees. *Hamilton v. Travelers Ins. Co.*, 752 F.2d 1350, 1352 (8th Cir. 1985).

Because the only standard to review termination and modification is compliance with the terms of the plan, the intent underlying a decision to modify or terminate, whether ill-motivated or altruistic, is not subject to court review. Whenever an employer makes a decision to establish, amend, or terminate an employee benefit plan, the motivation behind those actions is irrelevant. See *Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, ____U.S.____ (1989). ERISA is concerned with the administration of the plan after it has been established rather than mandating its establishment and requiring that it be continued indefinitely without reduction of benefits. *Id.; Viggiano v. Shenango Div. of Anchor Hocking*, 750 F.2d 276, 279 (3d Cir. 1984).

In a virtually identical case as the case at bar, the same determination was reached; the employer was not proscribed from terminating an insurance plan which provided benefits for health insurance for AIDS, that were neither vested nor accrued, and instituting a new plan with a cap on AIDS related payments. *Owens v. Storehouse*, 773 F. Supp. 416 (N.D. Ga. 1991). An absolute right existed to modify the health insurance benefits. *Id.* In McGann's case as well, the District Court was correct in ruling that an absolute right to modify the plan existed.

Although General American does not disagree with the analysis of the Fifth Circuit when it chose to evaluate McGann's § 510 argument, the analysis, albeit correct,

was not necessary inasmuch as the modification of the employee benefit plan was carried out in accordance with the summary plan description. Because H & H had an absolute right to modify the plan, the matter should not be reviewed.

COUNTERPOINT V

A NONEMPLOYER CANNOT BE HELD LIABLE FOR A § 510 VIOLATION.

In the alternative, without waiving the foregoing, another basis for no review being necessary by the United States Supreme Court is that McGann cannot sue General American under § 510 because General American did not employ McGann.[6] A § 510 claim does not apply to a nonemployer. *Rollo v. Maxicare of Louisiana*, 698 F. Supp. 111 (E.D. La. 1988); *cf. Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 326 (4th Cir. 1989).

The statutory language, legislative history, and case law all make clear that § 510 was designed to protect the "employment relationship." Without this relationship, there can be no § 510 claim.

Statutory Language:

Section 510 of ERISA, 29 U.S.C. § 1140, makes it "unlawful for any *person* to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under

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6. Although this issue was raised before the District Court and the Fifth Circuit, neither chose to address it. The Fifth Circuit did not decide the issue because of its disposition of the case on other grounds. *McGann*, 946 F.2d at 403-04 n.3.

the plan. . . ." [emphasis added]. At first glance, the reference to "any person" may appear to give the statute global application to all defendants; however, application to non-employers was not intended by Congress and is not evidenced by the statutory language within § 510 which uses verbs which anticipate improper conduct by the employer (e.g. discharge, fine, suspend, expel, discipline, or discriminate against).

Although the term "corporation" is included within the meaning of the word "person" for purposes of § 510, the term "insurer" is not within the definition.[7] Given the congressional intent to prohibit employers from discriminating against employees, surely the inclusion of "corporation" in the definition of "person" was addressing the employer/corporation and not the insurer/corporation, especially since § 510 seeks to curtail conduct which directly alters the employer/employee relationship and the insurer cannot directly, nor fundamentally, alter the plan participant's employment relationship.

Legislative History:

The congressional purpose underlying § 510 is to protect the employer/employee relationship. Employers have a financial incentive to discharge employees and executives who may become vested in substantial pension benefits. 119 Cong. Rec. 30374, *reprinted* in Legislative History at 1774-75. See also 119 Cong. Rec. 30044, *reprinted in* Legislative History at 641. To prevent employees from being terminated, Congress designed § 510 as a safeguard.

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7. "The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

Caselaw:

A fundamental prerequisite to a § 510 action is an allegation that the employer/employee relationship, and not merely the plan, was changed in some discriminatory fashion. *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990). Without an employer/employee relationship between the parties, a § 510 claim cannot exist. *Rollo v. Maxicare of Louisiana, Inc.*, 698 F. Supp. 111 (E.D. La. 1988). The Court in *Rollo* denied a motion for leave to amend a complaint to add a cause of action under § 510 against a doctor and a health maintenance organization which administered an employee health insurance plan. The court held that § 510 was not intended to apply to nonemployers, since the policy thrust of the statute targets the employment relationship out of which employee benefits arise, and because the section "speaks of conduct which, functionally, can only be completed by one who is an employer of the aggrieved person." *Id.* at 114.

In support of its holding, the *Rollo* court relied upon *West v. Butler*, 621 F.2d 240 (6th Cir. 1980), in which the Sixth Circuit affirmed the dismissal of a discrimination claim by pension fund trustees who sought to enjoin the defendants from picketing coal mines with which the fund had collective bargaining agreements. Since many employees refused to cross the picket lines, mine production fell and the fund contributions tied to coal production dropped. Hence, the plaintiffs argued that the defendant-picketers were interfering with the miners' pension benefits. Holding that the plaintiffs had not stated a cause of action under § 510, the Sixth Circuit noted that § 510 was "aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in

order to keep them from obtaining vested pension rights." *Id.* at 245. The Sixth Circuit concluded that to violate § 510, discrimination must substantially affect the employment relationship that gives rise to an individual's pension rights. *Id.* at 245-46. The Sixth Circuit found § 510 inapplicable to the defendant-picketers since, unlike the employer, the picketers were not in a position to disrupt the employment relationship directly. At worst, the picketers could prevent an employee from going to work. Even though *West* did not hold that only employers may be held liable under § 510, it expressly stated that § 510 only addresses conduct which fundamentally changes the employer/employee relationship.

Similarly, *Adams v. Koppers Co.*, 684 F. Supp. 399 (W.D. Pa. 1988), held that a pension plan was not a proper defendant under a § 510, 29 U.S.C. § 1140 claim. The "legislative history indicates that § 1140 was directed at employment decisions, which would not normally be under the control of the plan." *Id.* at 401.

In this case, the evidence did not show any suggestion that McGann's position had been terminated or jeopardized by either General American or H & H. McGann did not allege any interference by General American of his employment relationship with H & H. Even if McGann had alleged that General American had suggested that McGann retire or leave his position, that would not be the type of direct interference with the employer/employee relationship which would have given rise to a § 510 cause of action. *Swanson v. U. A. Local Pension Plan*, ___ F. Supp. ___ (W.D.N.Y. 1991).

As a practical matter, an insurance company is not in the posture to jeopardize the employer/employee relationship. Therefore, under the undisputed facts of this case,

McGann's allegation under § 510 claim directed against General American is not actionable because General American has never been McGann's employer and General American took no action to jeopardize McGann's employment relationship with H & H. The writ of certiorari should be denied because McGann cannot state a claim against General American.

COUNTERPOINT VI

CONSPIRACY TO DISCRIMINATE IS NOT A CAUSE OF ACTION UNDER ERISA.

Without waiving the preceding argument, in reality, McGann did not plead a true § 510 violation against General American. Instead, McGann alleged that General American, in conjunction with H & H and Brook Mays, conspired to violate his rights under § 510. McGann alleged, "Defendants by conspiring together to change Plaintiff's insurance coverage acted for the purpose of interfering with Plaintiff's attainment of rights to which he was entitled or may become entitled" (Br. Opp. App. A p. A8). This "conspiracy to discriminate" allegation does not state a cause of action under ERISA. *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 712 (N.E. Ala. 1985), *affirmed*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). In *Phillips*, employees sued Amoco and others on § 510 theories because their employee benefits had been adversely affected by Amoco's sale of a company. The Court in *Phillips* recognized that a Plaintiff's claim for conspiracy to violate ERISA fails to state a cause of action under ERISA; the provisions of ERISA focus on the underlying wrong, rather than any conspiracy to commit the wrong. *Id.* at 22. Without admitting that McGann has the right to assert a § 510 claim

against General American, McGann's allegation that General American conspired against him to violate § 510 does not state a cause of action against General American upon which relief may be granted as a matter of law. This matter therefore should not be reviewed by the United States Supreme Court.

CONCLUSION

For the reasons stated above, the Fifth Circuit's decision and application of ERISA are consistent with the congressional intent underlying ERISA and the opinions of other circuits. The ruling by two courts upon reviewing the record that McGann failed to create a genuine issue of fact under Rule 56 does not present an important question of federal law unsettled by this Court, one in conflict with applicable decisions of the circuit courts or a case otherwise calling for the supervision of the Supreme Court of the United States. The petition for writ of certiorari should be denied.

Dated: March 6, 1992
Houston, Texas

Respectfully submitted,

DUNN, KACAL, ADAMS, PAPPAS & LAW

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1995
JURY DEMAND
JOHN McGANN,
Plaintiff

v.

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, AND GENERAL AMERICAN LIFE INSURANCE COMPANY,
Defendants

Filed August 2, 1989

Jesse E. Clark, Clerk

PLAINTIFF'S FIRST AMENDED COMPLAINT

JOHN McGANN, Plaintiff, complains of H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, and GENERAL AMERICAN LIFE INSURANCE COMPANY, Defendants, as follows:

INTRODUCTION

1. Plaintiff brings this action for violation of his rights under § 1140 of the Employee Retirement Income Security Act of 1974 (hereafter "ERISA"), 29 U.S.C. § 1001 *et seq*. Plaintiff alleges that Defendants have discriminated against him for exercising rights to which he is entitled under the provisions of an employee benefit plan, and for the purpose of interfering with the attainment of rights to which Plaintiff may become entitled under such plan, by wrongfully changing the employee

benefits coverage provided to Plaintiff through his employment with Defendant H & H MUSIC COMPANY and provided through BROOK MAYS MUSIC COMPANY. Because of the continuing and irreparable nature of the resulting injury, Plaintiff seeks expedited preliminary injunctive relief from this Court restoring to him all prior benefits. Plaintiff also seeks, pursuant to § 1140 of ERISA, reasonable attorneys' fees and costs, all benefits due to him under the terms of his prior benefit plan, and permanent injunctive relief restraining Defendants from further discriminating against Plaintiff.

2. Plaintiff also invokes this Court's power of pendant jurisdiction and brings a claim pursuant to § 501(1) of the Texas Commission on Human Rights Act, V.A.T.S. art. 5221k (1987). Plaintiff alleges that Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY discriminated against him with regard to his employment-related benefits on account of his handicap, Acquired Immune Deficiency Syndrome (hereafter "A.I.D.S"). Pursuant to the Texas Commission on Human Rights Act, Plaintiff seeks injunctive relief, costs and attorneys' fees, and compensatory damages.

3. Plaintiff also invokes the Court's power of pendant jurisdiction and brings claim pursuant to V.A.T.S. Insurance Code, art. 21.21, § 4(7)(b), prohibiting "unfair discrimination" in the benefits or terms and conditions in any contract of health insurance or payment of benefits thereunder. Plaintiff alleges that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY discriminated against him by refusing to insure or refusing to continue to insure Plaintiff due to his handicap. Pursuant to V.A.T.S. Insurance Code, art. 21.21, § 16, Plaintiff seeks injunctive relief, actual damages, court costs, and attor-

neys' fees. If the trier of fact finds that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY knowingly committed the acts of discrimination complained of, the Court shall award, *in addition,* two times the amount of actual damages.

4. Plaintiff also invokes the Court's power of pendant jurisdiction and brings claim pursuant to V.A.T.S. Insurance Code, art. 21.21-3, entitled "Discrimination Against Handicapped Prohibited," which prohibts an insurer from discriminating against a handicapped insured by refusing to insure or refusing to continue to insure a handicapped individual. Plaintiff alleges that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY unfairly discriminated against him by initiating a cessation of coverage. Pursuant to V.A.T.S. Insurance Code, art. 21.21, § 16, Plaintiff seeks injunctive relief, actual damages, court costs, and attorneys' fees. If the trier of fact finds that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY knowingly committed the acts of discrimination complained of, the Court shall award, *in addition,* two times the amount of actual damage.

5. Plaintiff also invokes the Court's power of pendant jurisdiction and brings claim pursuant to V.A.T.S. BUS. & COM. CODE § 17.41 *et seq.*, the Texas Deceptive Trade Practices—Consumer Protection Act, which prohibits "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Plaintiff alleges that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY, in providing its sērvice as group insurer, committed false and deceptive acts by inducing certain acts or events so as to cause itself to change from insurer of the medical/hospitalization policy of Defendants

H & H MUSIC COMPANY AND BROOK MAYS MUSIC COMPANY to merely becoming the administrator of such policy. Further, pursuant to V.A.T.S. BUS. & COM. CODE § 17.50, Plaintiff seeks injunctive relief, actual damages, court costs, and attorneys' fees. If the trier of facts finds that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY knowingly committed unconscionable acts, or acts in violation of V.A. T.S. Insurance Code, art. 21.21, the Court shall award not more than three times the amount of actual damages in excess of $1,000.00.

6. Plaintiff also invokes the court's power of pendant jurisdiction and brings claim pursuant to V.A.T.S. BUS. & COM. CODE § 17.41 *et seq.*, the Texas Deceptive Trade Practices—Consumer Protection Act, which prohibits "false, misleading, or deceptive acts or practices in the conduct of trade or commerce." Plaintiff alleges that Defendant employer, H & H MUSIC COMPANY, as fiduciary for the medical/hospitalization policy for employee JOHN McGANN, your Plaintiff, committed fraudulent acts by its intent to conceal from the Plaintiff, through a concerted effort with the other defendants, that the medical/hospitalization group policy on which Plaintiff would rely to obtain his medically necessary treatments, would be modified to eliminate medical/hospitalization benefits. Plaintiff relied upon Defendant H & H MUSIC COMPANY to act as a proper fiduciary, and Plaintiff's reliance upon Defendant H & H MUSIC COMPANY has caused Plaintiff immense injury. Further, pursuant to V.A.T.S. BUS. & COM. CODE § 17.50, Plaintiff seeks injunctive relief, actual damages, court costs, and attorneys' fees. If the trier of fact finds that Defendant H & H MUSIC COMPANY knowingly committed unconscionable acts, or acts in violation of V.A.T.S. BUS. & COM.

CODE § 17.50, the Court shall award not more than three (3) times the amount of actual damages in excess of $1,000.00.

7. Plaintiff also brings causes of action for breach of contract, and related state law claims against Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY, arising out of the breach of fiduciary duties by Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY.

JURISDICTION

8. This Court has jurisdiction of this action under § 1132(e) of ERISA, 29 U.S.C. § 1001 *et seq.*, and under its power of pendant jurisdiction to hear Plaintiff's state law claims. The state law claims and the federal law claims derive from a common nucleus of operative fact.

PARTIES

9. Plaintiff JOHN McGANN is a resident of Houston Harris County, Texas, and a citizen of the United States. He has been employed by Defendant H & H MUSIC COMPANY since 1982.

10. Defendant H & H MUSIC COMPANY is a Texas Corporation, doing business as a music store in Houston, Harris County, Texas. Its registered agent is Clyde W. Reynolds, who may be served with process at 1211 Caroline, Houston, Harris County, Texas 77002.

11. Defendant BROOK MAYS MUSIC COMPANY is a Texas corporation, doing business in Houston, Harris County, Texas. Its registered agent is William C. Everitt, who may be served with process at 644 West Mockingbird, Dallas, Dallas County, Texas 75247.

12. Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY is a Missouri corporation, doing business in Texas. Its registered agent for service is Robert E. Jackson, who may be served with process at 1200 Summit Avenue, Suite 500, Fort Worth, Tarrant County, Texas 76102.

FACTS

13. At all relevant times, Defendant H & H MUSIC COMPANY was an employer engaged in an industry or activity affecting commerce within the meaning of 29 U.S.C. § 1002(5), (11), and (12) and § 2.01(5) of V.A.T.S. art. 5221k (1987).

14. At all material times, Plaintiff JOHN McGANN was an employee of Defendant H & H MUSIC COMPANY within the meaning of 29 U.S.C. § 1002(6) and § 2.01(4) of V.A.T.S. art. 5221k.

15. Defendant H & H MUSIC COMPANY's employee benefits plan, including but not limited to its group medical/hospitalization benefits plan, is an employee benefit plan within the meaning of 29 U.S.C. § 1002(3) and 29 U.S.C. § 1140, and whose Plan Administrator is Defendant BROOK MAYS MUSIC COMPANY.

16. Plaintiff JOHN McGANN was and is a participant in Defendant BROOK MAYS MUSIC COMPANY's employee benefits plan within the meaning of 29 U.S.C. § 1002(7) and 29 U.S.C. § 1140.

17. Plaintiff JOHN McGANN has been employed by Defendant H & H MUSIC COMPANY since 1982, and

thereafter covered by Defendant BROOK MAYS MUSIC COMPANY's Group Medical Care Plan.

18. In December 1987, Plaintiff JOHN McGANN was diagnosed as having A.I.D.S. This fact was well known by all defendants.

19. On August 3, 1988, Defendant BROOK MAYS MUSIC COMPANY announced that its Group Medical Care Plan covering Defendant H & H MUSIC COMPANY's employees, and wherein Defendant GENERAL AMERIAN LIFE INSURANCE COMPANY had been insurer, was cancelled effective August 1, 1988, and that the substituted group medical/hospitalization policy would be self-insured, with Defendant GENERAL LIFE INSURANCE COMPANY as administrator only. Benefits payable for A.I.D.S-related claims were modified from a lifetime maximum covered expense of $1,000,-000.00 to only $5,000.00, and therefore potentially excluded $955,000.00 in insured expenses available to Plaintiff JOHN McGANN.

20. On October 12, 1988, Plaintiff JOHN McGANN filed a complaint with the Texas Commission on Human Rights, alleging that he was discriminated against by Defendant H & H MUSIC COMPANY on account of his handicap, A.I.D.S. (TCHR Complaint No. 3890030). On or about April 10, 1989, he received his "notice of Right to File a Civil Action" from the Texas Commission on Human Rights.

21. Plaintiff believes that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY acted in conspiracy with Defendant H & H MUSIC COMPANY and Defendant BROOKS MAYS MUSIC COMPANY to violate Plaintiff's rights under ERISA and to discrimi-

nate against Plaintiff on account of his handicap, A.I.D.S. Prior to August 1, 1988, Plaintiff was fully insured for his handicapping condition of A.I.D.S. for the maximum expense of $1,000,000.00. On August 1, 1988, the Defendants acted in concert in conspiring to discriminate against Plaintiff JOHN McGANN. Defendants schemed so that Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY's obligations to Plaintiff JOHN McGANN would cease by termination of the General American policy and by imposition of an H & H Music Company/Brook Mays Music Company self-insured plan that limited the obligations of Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY to no more than $5,000.00 for claims related to Plaintiff's handicapped condition, but, again, whereby Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY remained administrator of the policy and no longer liable.

22. Defendants' wrongful actions toward Plaintiff have caused Plaintiff considerable mental suffering. Medical studies have consistently shown that increased anxiety levels, like that induced in Plaintiff by Defendants' actions, increase the likelihood of repeated infections and further worsen existing infections and medical problems of A.I.D.S. patients.

FIRST CAUSE OF ACTION

Interference with Protected Rights Under ERISA

23. Defendants, by conspiring together to change Plaintiff's insurance coverage, acted for the purpose of interfering with Plaintiff's attainment of rights to which he was entitled or may have become entitled under the employee benefit plan of Defendant H & H MUSIC

COMPANY or under ERISA, 29 U.S.C. § 1001 *et seq.* Defendant's actions thus constitute a violation of § 1140 of ERISA. As a result of Defendants' conspiratorial actions, Plaintiff has lost benefits of employment, suffered mental anguish, and been forced to employ attorneys in order to vindicate his rights and to obtain other appropriate equitable relief. In addition, Plaintiff has been forced to accept an inferior medical hospitalization insurance plan, which in essence is of little or no value, as it conveniently exempts those treatments that are necessary for maintenance of Plaintiff JOHN McGANN's health.

SECOND CAUSE OF ACTION

Texas Commission on Human Rights Act

24. Defendant H & H MUSIC COMPANY discriminated against Plaintiff JOHN McGANN by changing his insurance coverage on account of his handicap, A.I.D.S., in violation of § 5.01(1) of the Texas Commission on Human Rights Act, V.A.T.S. art. 5221k (1987). As a result, Plaintiff has lost benefits of employment, suffered mental anguish, and has had to employ attorneys in order to vindicate his rights.

THIRD CAUSE OF ACTION

Violation of V.A.T.S. Insurance Code, Art. 21.21

25. Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY, by conspiring together with Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY to change Plaintiff's insurance coverage, sought to unfairly discriminate in the benefits or terms and conditions of their health insurance plan effective prior to August 1, 1988. De-

fendant GENERAL AMERICAN LIFE INSURANCE COMPANY's actions constitute a violation of V.A.T.S. Insurance Code, art. 21.21, *et seq.* As a result of their acts, Plaintiff has lost benefits and has been forced to accept benefits that are virtually useless in assisting him in his immediate medical needs related to his handicapped condition.

FOURTH CAUSE OF ACTION

Violation of State Insurance Laws Protecting Handicapped

26. Defendants, by conspiring together to change Plaintiff's insurance coverage, sought unfairly to discriminate against Plaintiff, a handicapped person, by refusing to insure, or refusing to continue to insure, Plaintiff. As a result of these acts, Plaintiff has been damaged by the loss of benefits and has been forced to accept benefits that are virtually useless in assisting him in his immediate medical needs related to his handicapped condition pursuant to V.A.T.S. Insurance Code, art. 21.21-3.

FIFTH CAUSE OF ACTION

Deceptive Trade Practices by Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY

27. Defendants, by conspiring together to change Plaintiff's insurance coverage, caused Plaintiff to be damaged by Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY's false and deceptive acts by causing Plaintiff's existing medical policy to pre-

maturely terminate. Defendant GENERAL AMERICAN LIFE INSURANCE COMPANY's acts were knowingly committed in violation of V.A.T.S. BUS. & COM. CODE § 1741 *et seq.;* and, accordingly, Plaintiff has been damaged by the untimely loss of benefits and has been forced to accept benefits that are virtually useless in assisting him in his medical needs related to his handicapped condition.

SIXTH CAUSE OF ACTION
Deceptive Trade Practices by
Defendants H & H MUSIC COMPANY
and BROOK MAYS MUSIC COMPANY

28. By conspiring together to change Plaintiff's insurance coverage, Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY caused Plaintiff to be damaged by their false and deceptive acts, by their efforts to conceal information that they were purposely modifying their insurance policies to eliminate medical/hospitalization benefits that they knew were necessary to sustain Plaintiff. As a further direct and proximate result of this breach of duty, Plaintiff will personally incur medical expenses that were previously insurable. As a further result of the false and deceptive acts of Defendants H & H MUSIC COMPANY and BROOK MAYS MUSIC COMPANY, Plaintiff has suffered and will continue in the future to suffer considerable and severe mental anguish and anxiety and increased physical suffering.

SEVENTH CAUSE OF ACTION
Breach of Duty Created by Agency

29. Defendant H & H MUSIC COMPANY acted as

Plaintiff's agent for the purpose of doing generally what was needed to obtain and preserve insurance coverage for employees of H & H MUSIC COMPANY and owed to Plaintiff the duty owed by an agent to a principal. Defendant H & H MUSIC COMPANY breached this duty to Plaintiff by failing to notify Plaintiff, as obligated by such agency relationship, of the impending cessation of his needed medical/hospitalization benefits related to his known handicap. As a result of Defendant H & H MUSIC COMPANY's breach of duty, Plaintiff will personally incur medical expenses that were previously insurable. As a further result of Defendant H & H MUSIC COMPANY's breach of duty, Plaintiff has suffered and will continue in the future to suffer considerable and severe mental anguish and anxiety and increased physical suffering.

STATEMENT OF IRREPARABLE HARM

30. Plaintiff requests an expedited hearing on his request for preliminary injunctive relief, as Plaintiff will suffer irreparable injury unless this Court immediately orders Defendants to restore to Plaintiff his prior health insurance coverage, and restrains Defendants from further unlawful discrimination against Plaintiff. Defendants' unlawful actions are depriving Plaintiff of appropriate and necessary health insurance, and causing him to fear imminent financial and emotional helplessness. Such threatened injuries clearly outweigh any damage the requested injunction might cause to Defendants' interests of the public coincide with those of Plaintiff. Plaintiff has no adequate remedy at law due too the daily worsening of Plaintiff's financial and emotional states.

31. Plaintiff hereby demands a JURY on all issues triable by jury.

Wherefore, Plaintiff requests the following relief:

1. that, following an expedited hearing a preliminary injunction be issued to restore to Plaintiff his former insurance benefits; and that Plaintiff be granted a permanent injunction upon trial of this case;

2. that Plaintiff recover his compensatory damages, including the value of his lost insurance coverage, valued at NINE HUNDRED FIFTY-FIVE THOUSAND AND NO/100 ($955,000.00) DOLLARS and, additionally, such other actual damages as shall be proved at trial resulting from Defendants' unlawful conduct;

3. that Plaintiff, in addition to recovering actual damages, recover additional damages of TWO MILLION NINE HUNDRED EIGHTY-FIVE THOUSAND AND NO/100 ($2,985,000.00) DOLLARS, as pleaded should the trier of fact find the requisite knowledge in the commission of Defendants' conspiratorial scheme;

4. that Plaintiff recover damages for his mental anguish resulting from Defendants' tortious and discriminatory conduct;

5. that Plaintiff recover punitive damages due to Defendants' malice and bad faith and as justified by the evidence at trial in a sum in excess of ONE MILLION AND NO/100 ($1,000,000.00) DOLLARS;

6. that Plaintiff be awarded prejudgment and post-judgment interest at the maximum legal rate;

7. that Plaintiff recover reasonable attorneys' fees; and

8. that Plaintiff be awarded his costs of court and any other relief to which he proves himself entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-89-1995

JOHN McGANN,
Plaintiff

v.

H & H MUSIC COMPANY,
BROOK MAYS MUSIC COMPANY, AND
GENERAL AMERICAN
LIFE INSURANCE COMPANY,
Defendants

VERIFICATION

COUNTY OF HARRIS)
)
STATE OF TEXAS)

BEFORE ME, the undersigned authority on this day personally appeared JOHN McGANN, who, being by me duly sworn, made the following statements:

> "My name is JOHN McGANN, and I am the Plaintiff in this cause. I am aware of the factual allegations of Plaintiff's First Amended Complaint, and all such factual allegations therein are true and correct."

/s/ JOHN McGANN
John McGann

SWORN TO AND SUBSCRIBED BEFORE ME this 25th day of July, 1989.

/s/ AUDREY L. SEAWRIGHT
Notary Public in and for
the State of Texas

/s/ AUDREY L. SEAWRIGHT
Printed Name of Notary Public
My commission expires: 7/20/92

APPENDIX B

(Filed January 16, 1990, Jesse E. Clark, Clerk)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1995

JOHN McGANN,
Plaintiff

v.

H & H MUSIC COMPANY,
BROOK MAYS MUSIC COMPANY, AND
GENERAL AMERICAN
LIFE INSURANCE COMPANY,
Defendants

DEFENDANT GENERAL AMERICAN
LIFE INSURANCE COMPANY'S
MOTION FOR FINAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF
SAID COURT:

COMES NOW, General American Life Insurance Company ("General American"), a named Defendant herein, and files this its Motion for Summary Judgment and in support thereof would show the court as follows:

I.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, this Defendant would show that there is no material issue of fact and that Defendant, General American, is entitled to judgment as a matter of law. This Motion for Summary Judgment is based upon the pleadings herein, the affidavit of Albina Kraml League, at-

tached hereto as Exhibit "A" and incorporated herein by reference, and Exhibits "A-F" attached to Defendants, H & H Music Company and Brook Mays Music Company's Motion for Final Summary Judgment, incorporated herein by reference as well.

II.

Plaintiff herein alleges in his First Amended Complaint that H & H Music Company ("H & H"), Brook Mays Music Company ("Brook Mays"), and General American have violated the provisions of the Employee Retirement Income Security Act. 29 US.C. § 1001 *et seq.* ("ERISA"). Additionally, Plaintiff alleges that General American violated various provisions of Texas State law including:

(a) The Human Rights Act, V.A.T.S. Article 5221k (1987);

(b) V.A.T.S. Insurance Code Article 21.21;

(c) V.A.T.S. Insurance Code Article 21.21-3; and

(d) V.A.T.S. Business and Commerce Code § 17.41 *et seq.*, more commonly known as the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA").

III.

FACTS

All of the alleged facts as contained in Plaintiff's First Amended Complaint, for the purpose of this Motion, should be taken as true. The salient facts that relate to the substance of this Motion are summarized herein.

Plaintiff John McGann has been employed by Defendant H & H since 1982. During his employment at H & H, Plaintiff has been covered by Defendant Brook Mays' group medical plan. A true and correct copy of the Group Insurance Plan in effect from August 1, 1987, through July 31, 1988, is attached as Exhibit "A" in the Motion for Final Summary Judgment filed by H & H and Brook Mays and is incorporated herein by reference for all purposes. A copy of the Summary Plan Description Booklet ("SPD") associated with the plan and distributed to employees of H & H is attached as Exhibit "B" in the Motion for Final Summary Judgment filed by H & H and Brook Mays and is incorporated herein by reference for all purposes.

Plaintiff was diagnosed as having acquired immune deficiency syndrome ("AIDS") in December 1987. Plaintiff alleges that his diagnosis was known by all Defendants named herein.

IV.

On July 28, 1988, Brook Mays announced that the medical care plan covering H & H employees would terminate on August 1, 1988, and that a new group medical care plan would take effect. Brook Mays' announcement was made in writing and the writing is attached as Exhibit "C" in the Motion for Final Summary Judgment filed by H & H and Brook Mays and is incorporated herein by reference for all purposes. The change effected by Brook Mays was from a fully insured group medical plan to a self insured plan. General American and Brook Mays entered into an Administrative Services Agreement with respect to Brook Mays' new self insured medical plan. The Administrative Serv-

ices Agreement is attached as Exhibit "D" in the Motion for Final Summary Judgment filed by H & H and Brook Mays and is incorporated herein by reference for all purposes. Pursuant to the terms of the Agreement, General American received administrative services fees to administer and pay claims. Since Brook Mays' new plan was self insured no policy regarding medical benefits was issued to Brook Mays by General American. The SPD provided to all H & H employees contained the medical benefits offered under the new plan. Under Brook Mays' new plan, benefits payable for AIDS related claims were a lifetime maximum covered expense of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00).

Plaintiff alleges that all Defendants herein named conspired to violate Plaintiff's rights under ERISA and to discriminate against Plaintiff because he has acquired AIDS. The essence of Plaintiff's complaint is that Defendants did not have the legal right to change the Medical Benefits Plan offered to Plaintiff by H & H and Brook Mays once Plaintiff was diagnosed as having AIDS.

V.

PREEMPTION OF STATE LAW CLAIMS UNDER ERISA

The issue of the preemption of Plaintiff's state law claims has been taken up by the Court in the Motions to Dismiss and Answers filed by all Defendants herein named in this cause. Defendant General American reurges the position set forth in the Motions to Dismiss and Answers as the basis for dismissing all of Plaintiff's state law claims. As previously briefed for the Court,

there is no basis in litigation governed by ERISA for any causes of action under the Texas Insurance Code and the Texas Deceptive Trade Practices Act as a matter of law.

VI.

TERMINATION BY EMPLOYER OF GROUP BENEFIT PLAN

The first issue raised in this cause of action is whether Defendants H & H and Brook Mays had a legal right to terminate their group benefit plan as to all of their employees. The termination of the plan necessarily terminated Plaintiff's rights to any benefits under the plan. The termination of the plan terminated any rights the Plaintiff had to receive benefits under the plan because the plan would no longer be in existence to provide those benefits after its termination. The termination of the benefit plan was expressly provided for in the Summary Plan Description Booklet ("SPD") associated with the plan and distributed to all Defendant H & H employees. The SPD provides in pertinent part that "the plan sponsor may terminate or amend the plan at any time or terminate any benefit under the plan at any time." *See* Exhibit "B" to H & H and Brook Mays' Motion for Final Summary Judgment, incorporated herein by reference.

The question of whether ERISA prohibits the termination of group medical benefit plans has been addressed in *Hamilton v. The Travelers Insurance Company*, 752 F.2d 1350 (8th Cir. 1985). In *Hamilton*, an employee brought a declaratory judgment action against his employer and his group health insurer for a termination of coverage for expenses incurred by the employee

in connection with his son's eye injury. The employee sought to establish that his employee and group health insurer were required to provide insurance benefits for the expenses incurred in treating the son's injury after the insurance policy was terminated. The Plaintiff in *Hamilton* alleged violations of ERISA in the termination of the policy. The Court found no ERISA violations for the termination of the insurance policy.

In reaching its decision, the Court pointed out that the Summary Plan Description Booklet which was distributed to Hamilton explicitly provided that the employer, "as the plan's administrator, 'may terminate . . . the plan in whole or in part at any time, subject to the applicable provisions of the group insurance policies.' " *Hamilton,* 752 F.2d at 1351. The Court found that on the basis of the SPD the employer "was under no contractural obligation to refrain from terminating the plan." *Id.* Additionally, the Court agreed with the District Court's conclusion that " 'ERISA does not create liability on the part of the employer who changes the kind of health plan provided to employees where no contract prohibits or prevents such change.' " *Id.* at 1351-52. The Court then concluded that both the employer and the insurance company were entitled to judgment as a matter of law because ERISA did not proscribe their actions in terminating the medical benefits plan.

VII.

In the present case, it is undisputed that H & H and Brook Mays terminated their group plan with General American on July 31, 1988. The contractual documents associated with the plan, however, specifically reserved to H & H and Brook Mays the right to terminate

the plan. According to the Affidavit of Albina Kraml-League, which is attached hereto as Exhibit "A" and is incorporated herein by reference for all purposes, H & H neither needed nor obtained the approval of General American to terminate the fully insured benefits plan and substitute a self insured plan in its place. Since the actions of H & H and Brook Mays in terminating the plan were not violative of ERISA, as indicated by the *Hamilton* decision, the lack of participation on the part of General American in termination of the plan is clearly not a violation of ERISA.

VIII.

LACK OF VESTING IN PLAINTIFF OF MEDICAL BENEFITS

The second issued raised in this cause is whether the H & H and Brook Mays' medical benefits plan was not terminable by reason of the fact that the benefits under the plan vested in Plaintiff. In dealing with the vesting requirements of ERISA, Courts distinguish group insurance plans from retirement plans *Musto v. American General Corporation,* 861 F.2d 897 (6th Cir. 1988); *Moore v. Metropolitan Life Insurance Company,* 856 F.2d 488 (2nd Cir. 1988). In *Musto,* retirees brought a class action against a former employer under ERISA challenging changes in medical insurance coverage and seeking to block changes in spousal pension plan benefits. Distinguishing group insurance plans from retirement pension plans, the Court held that ERISA gives employees vested non-terminable rights in retirement plans but not in group insurance plans. *Musto,* 861 F.2d at 901. Since automatic vesting of benefits does not occur in welfare benefit plans, the rights of plan

participants are determined by the actual language of the plan documents. *Id.* at 900.

IX.

An application of the *Musto* decision to the case at bar indicates that Plaintiff's rights to benefits under the H & H and Brook Mays group benefit plan did not automatically vest in Plaintiff. Further, *Musto* indicates that since welfare plans do not automatically vest in participants the plan documents must be examined to determine whether or not vesting occurs. According to the plan documents attached as Exhibits "A" and "B" to H & H and Brook Mays' Motion for Final Summary Judgment and incorporated herein by reference for all purposes, the benefits conferred under the H & H and Brook Mays group benefit plan did not automatically vest in the plan participants. In fact, H & H and Brook Mays expressly reserved the right to terminate the plan at any time. Because Plaintiff did not have a vested right to benefits under the plan, the termination of the plan by H & H and Brook Mays was not an ERISA violation.

X.

CONCLUSION

On the basis of the foregoing, Defendant General American Life contends that no material issue of fact exists with respect to Plaintiff's claims in this cause of action. Pursuant to the group benefit plan documents, Defendants H & H and Brook Mays had an absolute right to terminate the plan and substitute a new one at any time. Additionally, General American had no power to prevent H & H and Brook Mays from terminating

the benefit plan and substituting a self insured plan. Consequently, Defendant General American is entitled to summary judgment as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Defendant General American Life Insurance Company prays that the Court enter judgment in favor of Defendant and for such other and further relief, both general and special, at law or in equity, to which Defendant General American may be justly entitled.

Respectfully submitted,

/s/ RICHARD M. LAW
Federal I.D. No. 5967
Attorney in Charge

OF COUNSEL:
DUNN, KACAL, ADAMS, PAPPAS & LAW

Federal I.D. No. 5967
2929 Allen Parkway
Suite 2600
Houston, Texas 77019
(713) 529-3992
Attorneys for Defendant,

GENERAL AMERICAN LIFE
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of January 1990, a true and correct copy of the above and foregoing instrument was forwarded, pursuant to the Federal Rules of Civil Procedure, to all counsel of record by certified mail, return receipt requested and/or by hand delivery.

/s/ RICHARD M. LAW
Richard M. Law

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-1995
JOHN McGANN,
Plaintiff

v.

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY and GENERAL AMERICAN LIFE INSURANCE COMPANY,
Defendants

AFFIDAVIT

STATE OF MISSOURI §
§
COUNTY OF ST. LOUIS §

BEFORE ME, the undersigned authority, on this day personally appeared ALBINA KRAML LEAGUE.

I am over the age of twenty-one years and competent to make this affidavit. I am employed as Director—Large Group Accounts Underwriting for General American Life Insurance Company, St. Louis, Missouri.

Prior to August 1, 1988, General American Life Insurance Company provided the employees of Brook Mays Music Company and H & H Music Company with a fully insured employee benefit plan, providing medical care expense insurance for employees and dependents, with a lifetime major medical maximum of $1,000,000.

As of August 1, 1988, eligible employees of the Brook Mays Music Company, and two associated companies, H & H Music Company and C & S Music Company, became insured for life and accidental death insurance only. The medical expense benefits coverage under the prior policy were cancelled and replaced by a self-insured benefits plan, which included a lifetime cap of $5,000 on benefits for AIDS. General American Life Insurance administers the self-insured benefits plan for Brook Mays Music Company, for a fee.

General American Life Insurance Company is not now, and has never been, the employer of John McGann.

H & H Music Company niether needed nor obtained the permission of General American Life Insurance Company to cancel the medical expense benefits coverage under the prior policy. H & H Music Company neither needed nor obtained the approval of General American Life Insurance Company to cancel the medical expense benefits coverage under the prior policy. H & H Music Company neither needed nor obtained the approval of General American Life Insurance Company with respect to their provisions of its new self-insured plan. General American Life Insurance Company had no power to prevent the employer from cancelling the medical expense benefits coverage under the prior policy and proceedings with a self insured plan. As a result of the employer's decision, General American Life Insurance Com-

pany, as of August 1, 1988, has not insured John McGann for medical expense benefits coverage.

General American Life Insurance Company made no representations or inducements whatsoever to H & H Music Company with reference to the employer's decision to cancel the prior medical expense benefits coverage and to initiate a self-insured benefits plan or or about August 1, 1988. Further, General American Life Insurance Company is not now nor has it ever conspired or schemed to conspire with H & H Music Company and/or Brook Mays Music Company to discriminate against John McGann with respect to withholding medical expense benefits payments.

FURTHER, affiant sayeth not,

/s/ ALBINA KRAML LEAGUE
Albina Kraml League
Affiant

SIGNED AND SWORN TO before me an January 17, 1989.

/s/ JOHN W. BATEMAN
Notary Public In And For The County Of St. Louis, State of Missouri

My commission expires 10-2-92.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Filed May 21, 1990
Jesse E. Clark, Clerk

CIVIL ACTION NO. H-89-1995
JOHN McGANN
Plaintiff

v.

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, AND GENERAL AMERICAN LIFE INSURANCE COMPANY
Defendant

DEFENDANT, GENERAL AMERICAN LIFE INSURANCE COMPANY'S SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, GENERAL AMERICAN LIFE INSURANCE COMPANY, (General American), a named defendant herein, and files this its supplement to its Motion for Summary Judgment and in support thereof would show the Court as follows:

I.

In his original petition, Plaintiff alleges that Defendant General American violated § 510 of ERISA which provides in part:

> It shall be unlawful for any person to . . . discriminate against a participant or beneficiary . . . for the

> purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

29 U.S.C. § 1140 (1985)

Section 510 was "aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." *West v. Butler,* 621 F.2d 240, 245 (6th Cir. 1980). The prohibitions in § 510 apply to employers not to plan administrators like General American. *Rollo v. MaxiCare of Louisiana, Inc.,* 698 F. Supp. 111, 113-14 (E.D. La. 1988).

Plainly, § 510 is not applicable in the instant case. The Affidavit of Albina Kraml League, (attached as exhibit "A" to Defendant General American Life Insurance Company's Motion for Final Summary Judgment) clearly indicates that Defendant General American is not Plaintiff's employer. The same situation existed in *Rollo.* The *Rollo* Court noted that § 510 was included in ERISA to guard against employers using "economic sanctions or violent reprisals" to prevent their employees from obtaining pension rights. The *Rollo* court noted that, although the Fifth Circuit had yet to rule on this precise issue, the Fifth Circuit did recognize the employer/non-employer distinction inherent in § 510. *Rollo* at 114, citing *Clark v. Resistoflex Co.,* 854 F.2d 762, 770-71 (5th Cir. 1988). Relying on *Clark,* as well as the legislative history of § 510, the District Court in *Rollo* correctly ruled that an employee cannot use ERISA § 510 to bring suit against a plan administrator.

General American has found one case, *Vogel v. Independence Federal Savings Bank,* 692 F.Supp. 587 (D. Md. 1988), where a plan administrator was sued under

ERISA § 510. The *Rollo* court expressly refused to follow the Maryland District Court's reasoning in *Vogel*, noting that it was inconsistent with the rulings of other Federal Courts, and instead relied on the legislative history and the dicta of *Clark* to reach its conclusion.

General American denies that it violated § 510 or any other section of ERISA. The evidence and existing case law clearly indicate that § 510 of ERISA does not apply to non-employers. Consequently, Defendant General American is entitled to summary judgment as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Defendant, General American prays that the Court enter judgment in favor of Defendant and for such other and further relief, both general and special, at law or in equity, to which Defendant General American may be justly entitled.

Respectfully submitted,

DUNN, KACAL, ADAMS,
PAPPAS & LAW

By: /s/ RICHARD M. LAW
Richard M. Law
Federal I.D. No. 5967
2929 Allen Parkway
Suite 2600
Houston, Texas 77019
(713) 529-3992

Attorneys for Defendant,
GENERAL AMERICAN LIFE
INSURANCE COMPANY

C4

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument is being served upon all counsel of record herein in accordance with Rule 72, T.R.C.P., on this the 21st day of May, 1990.

/s/ TINA BROUSSARD, Secretary
Tina Broussard, secretary

APPENDIX D

YOUR GROUP BENEFIT PLAN

BROOK MAYS
MUSIC COMPANY

SCHEDULE PAGE

The amounts shown below are the maximum amounts payable as subsequently explained:

Employee Only Insurance Coverage:

Life Insurance	Benefit Amounts (See most recent
Accident Death and Dismemberment Insurance	certification form for amounts

Modification of Insurance Schedule

The amount of Life and Accidental Death and Dismemberment Insurance of an employee less than age 65 shall be reduced to 65% of the otherwise applicable amount on his 65th birthday.

In no event shall an employee's Accidental Death and Dismemberment Insurance be more than $20,000.00 on or after his 70th birthday.

The Accidental Death and Dismemberment Insurance may not be converted to an individual policy.

EMPLOYEE AND DEPENDENT INSURANCE COVERAGE:

MEDICAL CARE INSURANCE:

Major Medical Expense:

Major Medical Maximum $1,000,000.00

Deductible Amount—an amount of covered expenses to which the deductible requirement applies equal to the

Individual Deductible Amount of 200.00
or the Family Deduuctible Amount of.... 600.00

No part of any covered expenses for which benefits are paid or payable under the Insured Portion may be used to satisfy the Family Deductible Amount.

The family deductible must be satisfied by the employee and members of his family insured as dependents.

The Benefits Maximum and the Deductible Amount shown above are subject to adjustment in the case of a person who has received benefits or incurred charges subject to the deductible, or both, under the Schedule previously in effect.

Deductible Accumulation Period—full calendar year (or end of next calendar year when expenses are "carried over" from one calendar year to the next, as explained in the Deductible Requirement provision on a Major Medical benefits description page).

Additional Deductibles:

A) For Inpatient Hospital Confinement:

Contributions to Plan:

You pay a portion of the cost to insure yourself and your dependents.

Termination or Amendment of Plan:

The Plan Sponsor may terminate or amend the Plan at any time or terminate any benefit under the Plan at any time. If premiums are not paid to the Insurance Company the benefits issued by the Insurance Company shall terminate at the end of the Grace Period.

The Insurance Company may terminate the benefits provided under the Group Policy by giving 31 days notice to the Plan Sponsor.

If less than 100% of those employees who do not have to contribute for dependent insurance under the Group Policy or less than 75% of those employees who do have to contribute for such dependent insurance are insured for such insurance, the Insurance Company may cancel the dependent insurance by giving notice in writing to the Plan Sponsor at least 31 days prior to the date insurance will end.

Cancellation of the policy or any of its provisions may be without the consent of the Plan Sponsor or any person claiming rights or benefits under the plan. If the policy cancels or any provision ends, it shall not affect any claim which begins before the date the policy or such provision ends, subject to the terms and conditions of the policy.

APPENDIX E

H & H MUSIC COMPANY

Houston's Largest Full Time Music Company

"Since 1945"

General Offices:
11522 Old Katy Road
Houston, Texas 77043
(713) 531-9222

July 28, 1988

Dear Valued Employees;

For many years we have provided a health insurance program for you and your dependents. Over the years, this plan has been responsible for heading off financial disaster which surely would have struck many families within the H & H Music Company family had it not been for this plan.

Over the last several years, the losses for the plan have mounted steadily. Last year the plan suffered financial disaster. For every dollar that was received in premium, almost $1.50 was spent in benefit payments. When you add to this the cost of paying the claims, administering the plan, and estimating the future impact of 20% inflation in medical cost, you can see that something drastic had to be done to save the plan. A time for tough decisions has come!

With these thoughts in mind, we were faced with either dropping the plan completely or redesigning the benefits so that we hopefully can get cost back under control; therefore, effective August 1, 1988, the following changes will be made to your medical plan:

1. Increase the calendar year deductible to $300.00.
2. Increase the individual stop-loss to $10,000 per calendar year. That is, the plan will pay 80% of

covered expenses to $10,000 and then 100% of the remaining covered expenses for the balance of the calendar year.

3. Limit treatment of AIDS to $5,000 per individual lifetime.
4. Exclude all treatment for chemical dependency (drug abuse and alcoholism).
5. Add the Sanus/Passport Preferred Provider Network and Utilization Review to the program. This arrangement will essentially allow you to choose physicians and hospitals which have negotiated with us to provide medical care on a reduced pre-contract fee basis. There will be financial incentives for you to use the providers on a pre-occurrence basis. It will be a freedom of choice plan. Because of the complexities involved and the education required, there will be manager briefings for this program by the end of August or first of September. Then the managers will brief the employees on the benefits of this arrangement.
6. Increase employee contributions by $2.75 per pay day for individual coverage and $17.50 per pay day for family coverage.

While the decisions we had to make in order to save the plan were tough, we think that these changes will save the financial integrity of the plan and continue to allow it to provide financial security to the employees and their families of H & H Music Company.
Sincerely yours,

/s/ WM. C. EVERITT
William C. Everitt

APPENDIX F

SECTION II

MEDICAL CARE EXPENSE BENEFITS
as provided by
BROOK MAYS MUSIC COMPANY

MAJOR MEDICAL BENEFITS

Schedule

Important Notice

Your Medical coverage includes one or more features to help control medical care costs. Some features will affect the amount of benefits payable for your medical care. See the Cost Containment section of this plan for a further explanation.

Employee and Dependent Coverage	Amounts Applicable To You or a Dependent
Medical Care	
Lifetime Maximum For All Covered Expenses	$1,000,000
Lifetime Maximum for covered expenses incurred for:	
1. all treatment of nervous and mental conditions	$25,000
2. AIDS (Acquired Immune Deficiency Syndrome) and ARC (AIDS Related Complex)	$5,000

Deductible Amount—an amount of coverage expenses to which the Deductible Requirement applies equal to:

the Individual Deductible Amount of	$300
or the Family Unit Deductible Amount of	$900

The Family Unit Deductible must be satisfied by you and your family unit members covered as dependents.

No part of any covered expenses for which benefits are paid or payable by the plan may be used to satisfy the Family Unit Deductible Amount.

The following is Applicable When Service of a Participating Provider Are Utilized:

Services	The Plan Will Pay	Deductible Applies
1. Outpatient Diagnostic X-ray and Laboratory Service Charges incurred due to injury or illness (includes pre-admission testing)	100%	No
2. Outpatient Surgery and Anesthesia Service Charges	100%	No
3. Outpatient Hospital Charges for Medical Care, Services and supplies in connection with surgical procedures or injuries	100%	No

APPENDIX G

ADMINISTRATIVE SERVICES AGREEMENT

BY AND BETWEEN

BROOK MAYS MUSIC COMPANY
(Herein called the Client)

AND

GENERAL AMERICAN LIFE INSURANCE COMPANY
(Herein called the Service Contractor)

Whereas, the Client desires to provide benefits for certain classes of individuals in accordance with a written plan (hereinafter called "the Plan") as described in Appendix D;

Whereas, under said Plan the Client will bear all liabilities but desires that the Service Contractor provide certain services in connection with the administration and operation of the Plan;

Now, therefore, in consideration of the payments to the Service Contractor as provided in the Payment Schedule, Appendix B, and subject to the terms and conditions contained herein, it is hereby agreed as follows:

Section 1. Services

The Service Contractor will provide the services listed in Appendix A subject to modification as provided herein, for the administration and operation of the Plan; such services to be coordinated by a representative of the Service Contractor to assure effective and efficient operation of the Plan.

Section 2. Banking Arrangements

The Client shall establish a separate Benefit Plan Account in a bank as the depository for funds to be used by the Service Contractor to make payments pursuant to this Agreement and the Plan. The Client shall notify said bank that they have authorized the Service Contractor, by execution of this Agreement, to issue and accept checks drawn on such account on behalf of the Client for the purpose of payment of benefits under the Plan. It shall be the Client's responsibility to maintain funds in this Account sufficient to cover all checks validly issued by the Service Contractor's authorized employees.

Section 3. Client Reports, Records and Information

The Client hereby agrees to furnish the Service Contractor with certain necessary reports, records, and information in order to carry out its duties hereunder.

It is mutually agreed that the Service Contractor shall not be responsible for delay in the performance of its duties under this Agreement or for non-performance hereunder, if such delay or non-performance is caused or contributed to in whole or in part by the failure of the Client to promptly furnish any required information.

Section 4. Payments to the Service Contractor

For each month in which the Service Contractor performs duties pursuant to this Agreement, the Client shall make payment to the Service Contractor of amounts due within 10 days of the date of notification to the Client by the Service Contractor. The amount due shall be determined from the Payment Schedule in Appendix B. Charges for hourly services will be determined in ac-

cordance with the Service Contractor's established time allocation procedures, and those of other organizations from whom hourly services are purchased.

Printed material, not listed in Appendix A, will be billed for specific items furnished.

The Service Contractor shall have the right to adjust their fees as of the date (a) the Plan is amended to modify benefits, or (b) its cost of operation is increased solely by virtue of a change in charges to the Service Contractor by a governmental unit, but such adjustment shall be limited to the amount of the change. The Service Contractor also shall have the right to adjust their fees on the annual anniversary of this Agreement and annually thereafter.

Section 5. General Provisions

(a) The Service Contractor in performing its duties under this Agreement is acting only as agent of the Client, and the rights and responsibilities of the parties shall be determined in accordance with the law of agency except as otherwise herein provided.

(b) The Service Contractor shall use reasonable care and diligence in the exercise of its powers and the performance of its duties hereunder, but shall not be liable for any mistakes of judgment or other action taken in good faith, or for any loss unless resulting from its gross negligence.

(c) The Service Contractor agrees to indemnify the Client and hold the Client harmless against any and all loss, damage, and expense, including court costs and attorney's fees, resulting from or arising out of the dishonest, fraudulent, criminal acts or acts of gross negligence of the Service Con-

tractor's employees, either acting alone or in collusion with others. The Service Contractor shall maintain Blanket Bond Coverage with a limit in reasonable proportion in the volume of claims administered.

(d) Except as provided in (c) above, the Client agrees to indemnify the Service Contractor and hold the Service Contractor harmless against any and all loss, damage, and expense, including court costs and attorney's fees, resulting from or arising out of claims, demands, or lawsuits brought against the Service Contractor in administering the Plan or to recover benefits under the Plan, including compensatory, punitive, or other damages, and including but not limited to claims for premium taxes by any governmental unit or other assessments made against the Service Contractor by governmental units.